Nos. 17-1717, 18-18

In the
Supreme Court of the United States

THE AMERICAN LEGION, et al.,
Petitioners,

v.

AMERICAN HUMANIST ASSOCIATION, et al.,
Respondents.

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,
Petitioner,

v.

AMERICAN HUMANIST ASSOCIATION, et al.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR *AMICI CURIAE* VETERANS OF FOREIGN WARS OF THE UNITED STATES, NATIONAL WWI MUSEUM AND MEMORIAL, THE NATIONAL TRUST FOR HISTORIC PRESERVATION AND PRESERVATION MARYLAND IN SUPPORT OF PETITIONERS

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December 21, 2018

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STATEMENT OF INTEREST[1]

The Veterans of Foreign Wars of the United States (VFW) is a congressionally chartered veterans service organization established in 1899 that represents over 1.7 million members. The VFW was instrumental in establishing the Veterans Administration, creating the World War II GI Bill and the Post-9/11 GI Bill and developing the national cemetery system. In just the past 30 years, the VFW has donated over $7 million to eight major memorial efforts in the capital region, including the World War II Memorial, Korean War Memorial, and Vietnam Veterans Memorial. Local VFW posts play a leading role in coordinating Memorial Day and Veterans Day observances across all 50 states.

Honoring the 116,516 Americans who died serving their country in World War I is a core, longstanding commitment of the VFW. During the Great War, the VFW offered every American in uniform serving overseas membership *gratis* and provided legal and logistical support on the home front. The VFW recently donated $300,000 to the national WWI memorial in the Nation's capital, ground for which broke in November 2017. And

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2(a), *amici* certify that counsel of record for all parties received timely notice of *amici*'s intent to file this brief, that respondents have provided written consent to the filing of this brief, and that the remaining parties have consented to this filing in letters on file with the Clerk's office.

during the centenary of America's participation in WWI, the VFW has made the restoration and upkeep of WWI memorials across the country a priority through its 100 Cities/100 Memorials programs.

The National World War I Museum and Memorial was founded in Kansas City in 1918, and erected following donations from 83,000 local residents. The five allied commanders attended the dedication in 1921: General Baron Jacques of Belgium, General Armando Diaz of Italy, Marshall Ferdinand Foch of France, General John Pershing of the United States, and Admiral David Beatty of the United Kingdom. Vice President Coolidge and local Army veteran Harry S. Truman were among the dignitaries who, with 100,000 Americans, attended its dedication in 1921. The Memorial was opened in 1926 by President Coolidge, together with 150,000 local residents—considered the largest crowd a U.S. President had spoken to up to that time. In 2004, Congress designated it as America's official museum dedicated to WWI, and in 2014, President Obama signed legislation naming it a national monument, and conferring the designation as the National WWI Museum and Memorial. The Museum holds the most comprehensive collection of World War I objects and documents in the world and is the second-oldest public museum dedicated to preserving the objects, history, and experiences of the war. The National WWI Museum and Memorial is America's leading institution dedicated to remembering, interpreting, and understanding the Great War and its enduring impact on the global community.

The National Trust for Historic Preservation in the United States is a private nonprofit organization chartered by Congress in 1949 to "facilitate public participation" in the preservation of our nation's heritage, and to further the historic preservation policy of the United States. *See* 54 U.S.C. §312102(a). Congress intended the National Trust to "mobilize and coordinate public interest, ... participation[, and resources] in the preservation and interpretation of sites and buildings." S. Rep. No. 81-1110 (1949). With more than one million members and supporters around the country, and 27 Historic Sites open to the public, the National Trust works to protect significant historic sites and to advocate historic preservation as a fundamental value in programs and policies at all levels of government. In addition, the National Trust has been designated by Congress as a member of the Advisory Council on Historic Preservation, which is responsible for working with federal agencies to implement compliance with Section 106 of the National Historic Preservation Act. 54 U.S.C. §§304101(8), 304108(a). The National Trust has participated in hundreds of cases in federal and state courts relating to the application and interpretation of legal issues that affect the preservation of historic places.

The Society for the Preservation of Maryland Antiquities, now known as Preservation Maryland, is a private nonprofit organization established in 1931 to provide for the preservation of the historical and archaeological data, records and property of Maryland. In the late 1940s, Preservation Maryland joined with other statewide preservation groups from across the nation to help establish the National Trust

for Historic Preservation and was a key advocate in both the passage of the National Historic Preservation Act of 1966 and the establishment of the Maryland Historical Trust, one of the oldest state preservation agencies in the nation in 1961. As one of the oldest statewide preservation organizations in the nation, Preservation Maryland has nearly 8,000 members and supporters across the state that support the effort to protect the places, stories and communities which make Maryland unique. Preservation Maryland is widely recognized across Maryland as the chief advocate for the preservation of the state's historic places and has invested millions of privately raised dollars in rehabilitation, restoration and revitalization projects across the state. Over its 87-year history, Preservation Maryland has participated in several notable cases in state and local courts relating to the preservation of historic places.

SUMMARY OF THE ARGUMENT

"The history of man is inseparable from the history of religion." *Engel v. Vitale*, 370 U.S. 421, 434 (1962). It is therefore "unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 35-36 (2004) (O'Connor, J., concurring in the judgment). That is nowhere more evident than in the imagery surrounding WWI, where the cross-shaped battlefield gravemarkers that carpeted the fields of Europe and Asia Minor during the conflict became a powerful symbol of the unprecedented devastation the war

wrought. Indeed, as *respondent's* own expert in this case documented, "cross gravestones ... quickly emerged as a cultural image of the battlefield" after WWI, and they "developed into a central symbol of the American overseas cemetery." JA2256, 2270.

The battlefield cross also became a ubiquitous feature of the countless memorials that communities erected to honor the more than 115,000 Americans who died serving their country. Prince George's County was one of those communities. Within months of the war's end, private citizens from the County, including mothers of men who died in the war, resolved to build a memorial in honor of the 49 men they had lost. JA1962. The 49 fallen Prince George's County men were a cross-section of American society. Their ages ranged from 18 to 51. Some were college educated, others high school dropouts. They were native-born and immigrants; a surgeon, grocery clerk, carpenter, and farmers; soldiers, sailors, Marines, airmen[2]; officers and enlisted men.[3] Twelve were African-Americans, including two who served in the famous 372nd Infantry Regiment, a segregated combat unit attached to the French Army's Red Hand Division.[4] They included a recipient of the Medal of Honor, two recipients of the Distinguished Service Cross, and

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[2] Although the Air Force was not founded until 1947, men listed on the Bladensburg Cross served both in the Army Air Service and as naval aviators. *See* Ann E. Marimow & Michael E. Ruane, *A World War I Cross Under Siege*, Washington Post (Sept. 21, 2018) https://wapo.st/2PRTSYC.

[3] Marrimow & Ruane, *supra* note 2.

[4] *See* JA3381-99; Marrimow & Ruane, *supra* note 2.

one recipient of the Croix de Guerre.[5] More than a dozen were buried in Arlington National Cemetery; at least three remain buried in France; and the whereabouts of seven are unknown.[6] Not all of their religions are known.[7]

After the committee struggled to raise funds to build a memorial to Prince George's County's fallen, the American Legion took up their cause. In 1925, the American Legion completed the Bladensburg Peace Cross. The Peace Cross is a 32-foot-tall, cross-shaped memorial. The seal of the American Legion is prominently situated in the center of the cross; around the base in large bronze letters are the words VALOR, ENDURANCE, COURAGE, and DEVOTION; and a 9-foot-wide, 2-foot-high plaque on the pedestal bears the name of the 49 local fallen, as well as an inscription and a quotation from Woodrow Wilson's message to Congress asking for a declaration of war. The Peace Cross is found in Bladensburg's Veterans Memorial Park, which includes a Battle of Bladensburg (War of 1812) Memorial, Pearl Harbor Memorial, Korea-Vietnam Veterans Memorial, World War II Honor Scroll, and September 11 Memorial Garden. The State of Maryland acquired the memorial from the American Legion in 1961 after increased traffic required the government to take title to what had become the median of a busy intersection.

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[5] *Id.*

[6] *Id.*

[7] *Id.*

Like hundreds of other WWI memorials around the world, the memorial's cross shape was chosen by the Gold Star mothers of Prince George's County to evoke the gravemarkers on the battlefields where their sons died. As Mrs. Martin Redman explained in 1920, "my son, Wm. F. Redman, lost his life in France, and because of that I feel that our memorial cross is, in a way, his grave stone." Pet.App.102a.[8]

The Fourth Circuit saw the Peace Cross very differently. While there is no dispute that the memorial was erected for the secular purpose of honoring the 49 men of Prince George's County who perished in WWI, a sharply divided court declared that the memorial's predominant message is not to honor the fallen, but to endorse Christianity. The majority casually dismissed the district court's finding "that the Cross at issue here evokes the image of white crosses on foreign battle fields," Pet.App.18a, and never once mentioned that several members of *this Court* reached the same conclusion about a comparable cross. *See Salazar v. Buono*, 559 U.S. 700, 721 (2010) (plurality) (recognizing that a Latin cross can "evoke[] thousands of small crosses in foreign fields marking the graves of Americans who fell in battles"). Indeed, the majority ignored nearly all the voluminous history presented to the district court (other than to note that the poppy has oft been used to commemorate WWI). Pet.App.19a n.10.

Instead, the court focused exclusively on what it viewed as "the Latin cross's inherent religious

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[8] "Pet.App." refers to the petitioner's appendix filed by the American Legion in case number 17-1717.

meaning," concluding that, "in the memorial context, a Latin cross serves not simply as a generic symbol of death, but rather a Christian symbol of the death of Jesus Christ." Pet.App.17a-18a. In the majority's view, "while the Latin cross may generally serve as a symbol of death and memorialization, it only holds value as a symbol of death and resurrection *because* of its affiliation with the crucifixion of Jesus Christ." Pet.App.18a (emphasis added). Accordingly, the court held that this century-old war memorial violates the Establishment Clause.

That startling result reflects a profound lack of regard for the historical underpinnings that led to the erection of the Peace Cross and so many other memorials like it. Millions of people the world over have used the cross as a symbol of military sacrifice, particularly in regard to WWI. Contemporary art, political debate, and countless memorials to the fallen confirm that the cross swiftly became a symbol of the terrible price paid by the war's participants. That rich symbolism stretched across continents and dominated the public discourse in the decades after the Great War. And the cross continues to serve as a powerful and predominately secular symbol of martial sacrifice today. Communities all across the country—often with the help of local VFW Posts—conduct "white cross ceremonies" in which simple white crosses are erected to honor fallen veterans. Indeed, the VFW's own insignia is a Maltese Cross—not as an ode to Christianity, but as a secular symbol of martial valor and sacrifice.

An "objective observer" would have understood all this, and the Fourth Circuit should have too.

Instead, the court ignored this critical historical context and embraced a virtually *per se* rule that crosses may never be used in a government-owned memorial. In so doing, the court has "needlessly put[] at risk hundreds of monuments with similar symbols standing on public grounds across the country," Pet.App.97a (Niemeyer, dissenting from denial of rehearing en banc), including those on our country's most sacred ground, Arlington National Cemetery. Left standing, the decision below will inflame tensions in communities across America, sow religious divisiveness, and make it more difficult for groups like the VFW to commemorate, in the way their families and friends desire, those who made the ultimate sacrifice for this Nation. "Eradicating such references would sever ties to a history that sustains this Nation even today." *Elk Grove*, 542 U.S. at 36 (O'Connor, concurring in the judgment).

ARGUMENT

I. The Peace Cross Originates From One Of The Most Widely Recognized World War I Symbols Of Military Sacrifice.

While there are many things wrong with the decision below, among its most profound mistakes is the majority's conclusion that the Latin cross holds value as a symbol *only* "because of its affiliation with the crucifixion of Jesus Christ." Pet.App.18a. As the history of WWI makes unmistakably clear, a cross can mean a great many things to many people—including things that have nothing to do with Christianity. By insisting that the cross stands always and inevitably for the message with which *they* associate it, the panel majority ignored this

Court's admonishment that memorials and displays with potentially religious connotations may not be divorced from the critical "history and context" surrounding them. *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 866 (2005). And in ignoring that admonishment, the panel majority effectively wrote out of American history one of the most powerful and most well-recognized symbols of the sacrifice that so many made in the Great War.

A. Contemporary Literature, Poetry, and Art Reflect the Widespread Use of the Gravemarker Cross as a Symbol of Battlefield Sacrifice in WWI.

Almost as soon as soldiers began constructing makeshift gravemarkers to memorialize their fallen comrades, the cross came to symbolize the battlefield sacrifice that WWI demanded. Every schoolchild is familiar with John McCrae's "In Flanders Fields": "In Flanders fields the poppies blow/Between the crosses, row on row." These verses invoking the image of the gravemarker cross were "the most popular poem of the war," Paul Fussell, *The Great War and Modern Memory* 249 (2000), and they remain oft-quoted in Memorial and Veterans' Day commemorations today.[9]

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[9] *See, e.g.*, Ryan Phillips, *Starkville Hosts Annual Memorial Day Ceremony*, Starkville Daily News, May 29, 2018, https://bit.ly/2NJW180 ("Starkville Mayor Lynn Spruill fought through tears as she gave her Memorial Day address in front of the Oktibbeha County Courthouse on Monday and read 'In Flanders Fields' by John McCrae."); Michael D. Shear, *Obama Pays Tribute at Graves of World War I Soldiers*, N.Y. Times, Mar. 26, 2014, https://nyti.ms/2mMIlxG ("[President] Obama

McCrae is but one of many poets—great and minor, professional and amateur—to invoke the gravemarker cross as a symbol of wartime sacrifice. After his son died on the battlefield in France, E.W. Hornung published "Wooden Crosses" in the *Times* in 1917:

> *"Go live the wide world over – but when you come to die,*
> *A quiet English churchyard is the only place to lie!"*
> *I held it half a lifetime, until through war's mischance*
> *I saw the wooden crosses that fret the fields of France.*
>
> . . . .
>
> *Who says their war is over? While others carry on,*
> *The little wooden crosses spell but the dead and gone?*
> *Not while they deck a skyline, not while they crown a view,*
> *Or a living soldier sees them and sets his teeth anew!*
>
> *The tenants of the churchyard where the singing thrushes build*
> *Were not, perhaps, all paragons of promise well fulfilled:*
> *Some failed – though Love, or Liquor – while the parish looked askance.*

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recited part of a famous poem, 'In Flanders Fields,'" while at the Flanders Fields American Cemetery in Belgium).

> *But – you cannot* ***die*** *a failure if you win a cross in France.*

E.W. Hornung, "Wooden Crosses," *reprinted in* Delphi Complete Works of E.W. Hornung (2016).

The gravemarker cross also was invoked by those who were more ambivalent about the sacrifices demanded of the fallen. Oliver Hogue, an Australian soldier at Gallipoli, wrote of a friend shot the night before evacuation, who "lies there under the hill, with a wooden cross above him":

> *But it don't seem right for me to be off,*
> *and to leave old Jim behind.*
> *Jim, just quietly sleeping; and hundreds*
> *and thousands more;*
> *For graves and crosses are mighty thick*
> *from Quinn's Post down to the shore!*

Oliver Hogue, "ANZAC," *reprinted in Trooper Bluegum at the Dardanelles* 283 (Oliver Hogue ed., 1916). For Hogue, the "crosses ... mighty thick" were not some religious emblem, but a symbol of the futility of the slaughter at the Dardanelles.

The same imagery made it to America even before the United States entered the war. Alan Seeger, an American poet who joined the French Foreign Legion and died fighting in the war, penned:

> *Under the little crosses where they rise*
> *The soldier rests. Now round him undismayed*
> *The cannon thunders, and at night he lies*
> *At peace beneath the eternal fusillade ...*

Alan Seeger, "Champagne, 1914-15" *reprinted in Rendezvous with Death: American Poems of the Great War* 113 (Mark W. Van Wienen ed., 2002).

As in Europe, American poets who felt disillusioned by the war adopted the cross as a symbol of the conflict's cruelties—sometimes with shocking effect. Ernest Hemingway wrote in 1923:

> *Soldiers never do die well;*
> *Crosses mark the places—*
> *Wooden crosses where they fell,*
> *Stuck above their faces.*
> *Soldiers pitch and cough and twitch—*
> *All the world roars red and black;*
> *Soldiers smother in a ditch,*
> *Choking through the whole attack.*

Ernest Hemingway, *Champs D'Honneur, reprinted in Complete Poems of Ernest Hemingway* 27 (University of Nebraska Press 1992).[10]

The gravemarker cross also was commonplace in contemporary novels and films about WWI. Roland Dorgelès' 1919 novel *Les Croix de Bois* (Wooden Crosses), for example, was one of the leading works

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[10] As recently as this year, Hemingway's "*Champs D'Honneur*" was used in the libretto of a composition in remembrance of the centenary of the Armistice. *See* Philip Lasser, *The Elements* (2018) https://bit.ly/2EyVHHL.

Nor has the association of the gravemarker cross, WWI, and anti-war protest faded from American popular culture. As Boston punk rock band Dropkick Murphys sang in 2005, on an album that was RIAA-certified Gold:

> *But here in this graveyard that's still no man's land*
> *The countless white crosses in mute witness stand*
> *To man's blind indifference to his fellow man*
> *And a whole generation were butchered and damned.*

Eric Bogle, *The Green Fields of France, on Plain and Simple* (Plant Life Records 1981).

of French literature that attempted to process the horror the nation had just experienced. The best-selling book in America in 1919 was the English-language translation of Vincente Blasco Ibanez's *The Four Horsemen of the Apocalypse* (1916), an anti-war epic that reaches its climax in a war cemetery surrounded by rows and rows of crosses. This scene is visually overwhelming in the blockbuster 1921 film adaptation. App.1.[11] Another landmark anti-war film, *J'Accuse*, also employed the image of a battlefield strewn with gravemarker crosses to effect its protest. App.2.

The fine arts testify to the widespread contemporaneous use of the gravemarker cross as a symbol of battlefield sacrifice in WWI, employed by artists of varied religious backgrounds and political beliefs. Post-expressionist artist and veteran Otto Dix used the moonlit image of a gravemarker cross to protest the horrors of war in "Soldier's Grave Between the Lines." App.3. George Clausen's *Youth Mourning*, which hangs in the Imperial War Museum, depicts a naked woman bent double and keening before a bare wooden gravemarker cross. App.4. Other examples abound, *see, e.g.*, App.21 (in which African-American artist Horace Pippin, a veteran of WWI, inserted incongruously into a paradise setting "white crosses that would have

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[11] "App." refers to the appendix *amici* filed with their brief on July 27, 2018 in case numbers 17-1717 and 18-18.

marked soldiers' graves" as "a comment on the world that he's living in").[12]

And the gravemarker cross was ubiquitous in mass media, such as postcards. One French example shows a mother and son looking at a cross in a war-torn landscape, with the inscription, "*c'est ça la tombe a papa?*" App.6. American soldiers often sent home postcards of paintings, or even actual photographs, of battlefield graves and memorials in the shape of crosses, many examples of which are preserved in the archives of the National WWI Museum and Memorial. *See, e.g.*, App.7.

The U.S. government used the gravemarker cross in posters during the war. *See* App.8-9. Like the many poets, painters, and others who invoked this powerful image, the government used the cross not as a call to religious conversion, but as a potent representation of lives lost, and a call to take up the cause for which they were given. And for nearly a century, the Peace Cross has used the same symbol to honor 49 men who answered that call.

None of this is surprising. The Great War, which transformed so much else, transformed many symbols. The poppy, for instance (with which the Fourth Circuit majority was much taken as a purportedly neutral option, Pet.App.20a & n.10), historically had been a pagan religious symbol of death, sleep, and the goddess Demeter.[13] That was

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[12] Jodi Heckel, *Poet Janice Harrington's New Work Reflects on Life and Art of Painter Horace Pippin*, Ill. News Bureau (Oct. 12, 2016), https://bit.ly/2CpVEwI.

[13] Likewise, the obelisk that respondents favor over the cross-shaped memorial has its origin as a pagan religious

true both of the corn poppy (the same type found in Flanders' Field) and the opium poppy. *See* 7 James George Frazer, *The Golden Bough* 43-44 (Macmillan & Co. 1912). It was Flanders that transformed the poppy into a symbol of warfare and remembrance.

So too with the cross. The Fourth Circuit seemed to fear that treating the Peace Cross as a symbol of WWI sacrifice would force the court to "circumscribe [its] meaning and power" and "diminish the Latin cross's many years of accrued religious symbolism." Pet.App. 58a. But as history powerfully illustrates, it was the sacrifice of millions of young men in Europe, Africa, Asia, and the high seas that gave the cross power as a symbol of wartime, not just religious, sacrifice. *Cf.* Abraham Lincoln, *Gettysburg Address* (Nov. 19, 1863) ("[W]e can not dedicate—we can not consecrate—we can not hallow—this ground. The brave men, living and dead, who struggled here, have consecrated it, far above our poor power to add or detract.").

B. The Use of Gravemarker Crosses in WWI Memorials Was Ubiquitous.

Unsurprisingly given the powerful symbol they had become, gravemarker crosses only proliferated in the wake of WWI. Almost as soon as the war ended, the U.S. government set about replacing the temporary battlefield cemeteries with permanent cemeteries in the countries where Americans had fallen. Initially, the War Department planned to use marble tombstones of the type found in Arlington

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symbol. *See generally* Brian A. Curran et al., *Obelisk: A History* (MIT Press 2009).

National Cemetery, with a religious insignia carved upon them. But the gravemarker cross had become so deeply associated with the war that public pressure forced the government to change course. Channeling public sentiment, the House of Representatives insisted on using marble markers imitating the wooden crosses or Stars of David. As a Congressional Resolution explained:

> [W]ooden crosses have marked the graves on the battle fields of Europe of American soldiers, sailors, and marines who died in the World War from the first burials in war time until the present day, or markers of like proportions and design bearing the Star of David....
>
> [T]hese wooden symbols have, during and since the World War, been regarded as emblematic of the great sacrifices which that war entailed, have been so treated by poets and artists and have become peculiarly and inseparably associated in the thought of surviving relatives and comrades and of the Nation with these World War Graves....

H.R. Res. 16, 68th Cong. at 1 (1924).[14]

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[14] Similarly, a 1924 resolution of the American Legion, introduced to Congress through testimony on this issue, read in part, "these crosses represent the symbol of America's sacrifice in the World War, and have been the inspiration of our great war poems, and were first improvised and erected by our comrades in the field and are fixed in the minds of the gold star fathers and mothers and the Nation as an impressive emblem of sacrifice for country and humanity." JA2284.

This groundswell of national support for gravemarker crosses plainly was not animated by a desire to propagate religion; the originally proposed tombstones would have had religious insignia anyway. Instead, it is just one of many concrete reflections of the strong association between the gravemarker cross and the First World War. Eventually, the American Battlefield Monuments Commission yielded to public and congressional pressure and ordered the use of marble crosses in the American cemeteries to be constructed throughout Europe. And there they have stood ever since, a symbol of American sacrifice, not of government-sponsored religious proselytization.

After the permanent cemeteries were built, Congress established the Gold Star Mothers' Pilgrimage program, which paid for 7,000 Gold Star mothers and widows to visit the graves of their loved ones in France. 45 Stat. 1508 (1929). (Travel to Europe was well out of the economic reach of ordinary Americans at the time.) The program was extremely successful—about 40 percent of those eligible went—and public support was so high that the government sustained the program even after the onset of the Great Depression. *See* Constance Potter, *World War I Gold Star Mothers Pilgrimages, Part I*, 31 Prologue 140 (1999), https://bit.ly/2Olc2lR.

Thus, when Gold Star mother Mrs. Redman said of the Peace Cross in 1920 that she felt "that our memorial cross is, in a way, [her son's] grave stone," Pet.App.102a, she was speaking in a language that the wider public readily would have understood. Throughout the construction of the Peace Cross,

graves, gravemarkers, and grave visits were prominent in national and local conversation. In 1919, for instance, the mother, sisters, and brothers of another one of the Prince George's County fallen commemorated on the Bladensburg Cross, Howard Morrow, wrote a small poem in the local paper:

> *Our thoughts are always wandering*
> *To the grave so far away*
> *Where our dear son and brother is lying*
> *In his peaceful and lonely grave.*
> *Oh for the sound of a silent voice*
> *And the touch of the hands that are still.*[15]

This was not a community that saw soldiers' graves as abstractions. Mrs. Redman's comment would have been understood much more literally than metaphorically. Indeed, that remains the case in Prince George's County today. As the *Washington Post* reported in 2018, after talking to the 84-year-old niece of John Henry Seaburn, an African-American private in the 372nd Infantry Regiment who is listed on the Bladensburg Cross, "The refrain among relatives was: 'John Seaburn is at the Peace Cross.'"[16] In short, the connection between the memorial and the gravemarkers that symbolized the Great War would have been unmistakable for anyone "aware of the history and context of the community and forum

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[15] *Our thoughts are always wandering*, *quoted in* Brett Reistad, *The Bladensburg Peace Cross is a Fitting Tribute*, Wash. Post (Nov. 13, 2018), https://wapo.st/2V0oE5m. Morrow's Family had another cross to remember him by, too: the Army awarded him the Distinguished Service Cross for rescuing a wounded comrade in the face of withering enemy fire. *Id.*

[16] Marimow & Ruane, *supra* note 2.

in which the [Peace Cross] appears." *McCreary*, 545 U.S. at 866.

As this undisputed—and indisputable—historical record reflects, the majority's begrudging admission that "*other* countries may identify the Latin cross as a commemorative symbol of World War I," Pet.App.18a-19a (emphasis added), ignores at least half the story. Crosses can be found at American cemeteries throughout Europe today because the gravemarker cross is the symbol that *our* country most strongly associated with the ultimate sacrifice that so many made during one of the deadliest wars in America's history.

C. Crosses Were Used as Universal, Not Just Individual, Memorials to the WWI Fallen.

The Fourth Circuit was just as wrong when it declared that "crosses used on World War I battlefields were *individual*—rather than universal—memorials to the lives of Christian soldiers." Pet.App.19a. In fact, WWI cemeteries routinely employed crosses not just to mark individual gravesites of Christian soldiers, but as a memorial to *all* who lay buried within. The St. Mihiel American Cemetery, for example, features a large monument of a cross with an American soldier in front of it—clearly a universal memorial to all lives lost. App.10. All of the gravestones at the Somme American Cemetery face a chapel, on one side of which is carved a large cross. App.11. And the chapels at *all* the American WWI cemeteries throughout Europe contain crosses. *See* G. Kurt

Piehler, *Remembering War the American Way* 100-01 (2004).

The practice of using a cross as a universal memorial to the fallen began before WWI even ended. In 1918, Britain's Commonwealth War Graves Commission selected a marble Latin cross with a broadsword pointing downward on its front as a standard memorial for all cemeteries containing more than 40 Commonwealth war dead. Catherine Manning, *Cross of Sacrifice*, Adelaidia (Feb. 25, 2015), https://bit.ly/2OnFlo6. This symbol, which the public spontaneously dubbed the "Cross of Sacrifice," *see* Fabian Ware, *Building and Decoration of the War Cemeteries*, 72 J. of the Royal Soc'y of Arts 344, 347 (1924), can today be found not only throughout the United Kingdom, Canada, Australia, and New Zealand, but in dozens of other countries—including many that are not majority Christian, or that have at least as strong a "wall between church and state," Pet.App.19a, as our own—such as China, Egypt, France, India, Indonesia, Lebanon, Myanmar, Pakistan, Singapore, Syria, and Yemen.[17]

A Cross of Sacrifice also can be found in the United States: Arlington National Cemetery houses the Canadian Cross of Sacrifice. App.12. Despite its name, that cross commemorates not Canadians, but Americans—those who volunteered to fight in the Canadian Army before the United States entered the war. That 24-foot-tall memorial was given to the

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[17] *See Find Cemeteries & Memorials*, Commonwealth War Graves Commission, https://bit.ly/2AdQOU0; *see also* Brett G. Scharffs, *The Autonomy of Church and State*, 2004 B.Y.U. L. Rev. 1217, 1237 (2004); *see also* App.14-15.

United States by Canadian Prime Minister MacKenzie King, approved by President Calvin Coolidge, and has served as a focal point for strengthening our alliance through WWII, the Cold War, and the present. *See Canadian Cross of Sacrifice (WWI/WWII/Korea)*, Arlington National Cemetery, https://bit.ly/2Ok8Zuk; App.12.

The Canadian Cross of Sacrifice is not the only "universal," cross-shaped WWI memorial at Arlington. Arlington is also the home of the Argonne Cross, a 13-foot-tall cross that, like the Bladensburg Peace Cross, was dedicated in the 1920s to soldiers who died in WWI. App.13. The Argonne Unit of the American Women's Legion erected the Argonne Cross at Arlington, just as the American Legion erected the Bladensburg Cross. Like the Bladensburg Cross, the Argonne Cross bears a patriotic symbol in the middle (an eagle surrounded by a wreath). And its base bears an inscription ("In Memory of Our Boys in France") that is every bit as "universal" as the inscription on the Bladensburg Cross, which names the 49 soldiers for whom the memorial was erected. While the Canadian Cross of Sacrifice and Argonne Cross may be the two most famous cross-shaped WWI memorials in the United States, they certainly do not stand alone. Countless such universal memorials dot the country—and each of them is equally threatened by the (mis)reading of history and the Establishment Clause embraced in the decision below.

The Fourth Circuit dismissed other countries' embrace of the Latin cross as a commemorative symbol of World War I on the mistaken belief that

only "this Nation, unlike others, maintains a clearly defined wall between church and state." Pet.App.19a. The Fourth Circuit again was wrong, for many "states, such as France and Turkey, adopt a strong separationist and secularist conception of the state." Brett G. Scharffs, *The Autonomy of Church and State*, 2004 B.Y.U. L. Rev. 1217, 1237 (2004) (footnotes omitted). And even in countries where "[r]eligion is to be strictly excluded from the public forum," *McCreary*, 545 U.S. at 886 (Scalia, J., dissenting), governments maintain cross-shaped WWI memorials. The French national cemetery at Douaumont (where the dead of Verdun were buried) features a huge cross on the sides of the 150-foot-high tower over the ossuary that houses unidentified remains. App.14. And in Turkey, the Commonwealth War Grave sites at Gallipoli, which "are the sovereign territory of the Turkish people," feature memorials to the missing bearing large crosses. App.15.[18] The Turkish government even assists with memorial ceremonies held for the soldiers buried there.[19] Thus, as it stands, the governments of both France and Turkey are more tolerant of government maintenance of cross-shaped WWI memorials than the Fourth Circuit.

Of course, permanent memorials are not the only way that the gravemarker cross is used to honor those who sacrificed their lives for our country. Communities all over America continue to hold "white cross ceremonies," which typically involve

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[18] *ANZAC Day Service*, Australian Government Dep't of Veterans' Aff., https://bit.ly/2EEZog1 (last visited Dec. 20, 2018).

[19] *Id.*

erecting white wooden crosses in the shape of gravemarkers to commemorate holidays such as Memorial Day or Veterans Day. *See, e.g.*, App. 16-17. In Burlington, Wisconsin, for example, "[w]hen a military service member or veteran from Burlington dies, Veterans of Foreign Wars Post 2823 makes a white wooden cross with their name on it and puts the cross alongside numerous others" in a city park.[20] And each year, the local American Legion Post in Henderson, Kentucky, sets up more than 5,100 white crosses in the city's central park—one for each local veteran who has died.[21] The tradition has gone on for decades.[22] The mayor of Fitchburg, Massachusetts, explained that his town's white cross ceremony is meant to honor "the courageous men and women who stepped forward and lost their lives defending liberty."[23] And communities that have permanent, cross-shaped memorials continue to hold Memorial and Veterans Day observances at them, just as the people of Prince George's County do at the Peace Cross.

Ceremonies small and large held to commemorate the 100th anniversary of the Armistice that ended WWI referenced the gravemarker cross

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[20] Megan Burke, *One Burlington Veteran, Four Stone Walls*, The Journal Times, May 28, 2018, https://bit.ly/2LB4ahE.

[21] Douglas White, *'It Puts a Lump in Your Throat': Memorial Crosses Going up in Central Park*, The Gleaner, May 11, 2017, https://bit.ly/2Oh3zjD.

[22] *Id.*

[23] Julia Sarcinelli, *Fitchburg's White Cross Ceremony Honors Fallen Heroes*, Sentinel & Enterprise, May 28, 2018, https://bit.ly/2LQUX1I.

symbol. *E.g.*, App.20 (reporting that citizens of New Canaan, CT, led by the VFW, military officers, and local officials, gathered to solemnize the centenary at the town's Wayside Cross, erected in 1923 to memorialize veterans); Brian Albrecht, *Veterans for Peace Will Read Soldiers' Letters of War on Veterans Day*, Cleveland.com (Nov. 4, 2018), https://bit.ly/2D3hBCh (noting a veterans' activist group's plan to commemorate the centenary by reading excerpts from letters from soldiers in WWI, including "Gerhard Gurtler, German Army: *'The battlefield is really nothing but one vast cemetery. Besides shell holes, groups of shattered trees and smashed-up farms, one sees little white crosses scattered all over the ground--in front of us, behind us, to the right and left.'*").[24]

* * *

As the foregoing reflects, the notion that the cross is always and inevitably associated with "the crucifixion of Jesus Christ," Pet.App.18a, ignores a chapter in our Nation's history that continues to have a profound impact even today. Whatever may have led the soldiers in WWI to mark the graves of their comrades with crosses, the image of battlefields lined with these makeshift memorials to the fallen soon came to symbolize a very different type of sacrifice:

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[24] Similarly, many Commonwealth countries continue to hold ceremonies centered on the Fields of Remembrance, in which white crosses are laid out to represent specific fallen, unknown soldiers, and in some iterations, units. *See, e.g.*, *Honouring New Zealanders Who Served in the First World War*, Fields of Remembrance N.Z., https://bit.ly/2xlm64F; Royal British Legion, *Field of Remembrance Opening Details*, https://bit.ly/2LwS72E (last visited Dec. 20, 2018).

the sacrifice of self for country. That powerful symbol of battlefield sacrifice simply cannot be divorced from the critical "history and context" out of which it arose. *McCreary*, 545 U.S. at 866.

II. The VFW's Own Insignia Demonstrates How A Cross Can Be Understood To Express Universal Values And Martial Virtues.

Of course, the gravemarker cross is hardly the only example of how a cross can come to symbolize something quite distinct from Christianity. The VFW's own experience illustrates the secular message that a cross can readily be understood to convey. The VFW is not a religious organization, but its insignia is a Cross of Malta, enclosing the Great Seal of the United States. The Cross of Malta was originally the insignia of the Knights of St. John, an order of twelfth-century crusader knights. Herbert Malloy Mason, Jr., *VFW: Our First Century* 15, 39 (1999). Its eight points (each arm ends in two distinct points) represent the Beatitudes as given by Jesus Christ, according to St. Matthew, in the Sermon on the Mount.

While the origins of the Maltese Cross are indisputably religious, its military connotations are equally undeniable. For ten centuries, the Maltese Cross has been associated with martial valor. It is the insignia of military knighthoods such as the Order of the Bath and units such as the Gharwal Rifles of India, the various historical Royal Rifle Regiment of the British and Commonwealth

militaries, and V Corps of the Army of the Potomac.[25] The highest award of bravery in many nations, such as Imperial Germany's *Pour le Merite* or Poland's *Virtuti Militari*, is a medal struck in the form of a Maltese Cross. *See* John Clarke, *Gallantry Medals & Decorations of the World* 70, 167 (2001).

The VFW represents 1.2 million veterans of every creed, race, and national origin. Those members look upon its badge not as a symbol of proselytization or exclusion, but as an emblem of military virtue stretching back ten centuries, and as a visual reminder of their own service. Like any reasonable observer, they "take account of context," *Van Orden v. Perry*, 545 U.S. 677, 700 (2005) (Breyer, J., concurring in the judgment). And just as the history and context of the Peace Cross ensure that it communicates a predominately secular yet solemn message of remembrance and thanks to 49 men who gave their lives for this Nation, the history and context of the Maltese Cross ensure that both veterans and the general public understand it as a symbol of military valor. In short, the Maltese Cross may have begun as a religious symbol, but its history did not end there.

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[25] *See Badge and Star: Order of the Bath, 1st Class (Military)*, Royal Museums Greenwich, https://bit.ly/2v9lIHh (last visited July 26, 2018); *Cap Badge, Other Ranks', The King's Royal Rifle Corps*, Imperial War Museum, https://bit.ly/2LpS7nX; K.V. Shrivastava, *Infantry* 140 (2000); 155th Regimental Ass'n, *Under the Maltese Cross: Antietam to Appomattox* ii (1910).

III. By Embracing A Rule That Ignores The Critical History And Context In Which A Cross Is Used, The Decision Below Threatens Memorials Across The Country.

As Judge Niemeyer correctly recognized, the majority's refusal to view the Bladensburg Peace Cross in the critical historical and present-day context surrounding it "needlessly puts at risk hundreds of monuments with similar symbols standing on public grounds across the country." Pet.App.97a. Indeed, the majority recognized as much—and yet just viewed that as the inevitable result of its (misguided) view of the Establishment Clause. At the close of its opinion, the majority made explicit what had theretofore been only implicit: that its holding leaves even venerable memorials at Arlington National Cemetery vulnerable to challenge. "[W]e are not deciding or passing judgment on the constitutionality of Arlington National Cemetery's display of Latin crosses," the majority ominously noted, Pet.App.26a n.16.—which, of course, will serve only to invite a challenge. And as long as the decision below provides the rule of decision for memorials within Virginia and the rest of the Fourth Circuit, it is difficult to see any meaningful distinction between the Bladensburg Peace Cross and the Argonne Cross or the Canadian Cross of Sacrifice. *See supra* pp.15-16.

The Fourth Circuit did suggest in dicta that secular surroundings at Veterans Memorial Park somehow make the Peace Cross *more* constitutionally suspect. Pet.App.27a. But that counterintuitive notion runs directly counter to *Van Orden*, which

concluded that a "physical setting" for a monument that "suggest[ed] little or nothing of the sacred" militated *against* finding an Establishment Clause violation. 545 U.S. at 702 (Breyer, J.). And in all events, if the physical setting of Arlington Cemetery somehow meaningfully distinguished it from Bladensburg's Veterans Memorial Park, then the majority would not have had to drop a footnote reserving judgment on whether some of the longest-standing memorials at the Nation's single most venerable shrine of military remembrance have also long been an affront to the Constitution.

And Arlington's cross-shaped memorials are just the beginning. Hundreds of memorials across the country bear crosses or other religious insignia. While these memorials have long served to focus the country on what binds us together, the decision below threatens to convert them into something that tears people apart. Just as troubling, the uncertainty that decisions like the one below create leaves governments in an impossible position, caught between the demands of those who now insist that longstanding memorials must be torn down in the name of the First Amendment, and those who seek to protect what they view as powerful, secular symbols of those who laid down their lives for their country.

For example, the city council of Belle Plaine, Minnesota, recently ordered a cross removed from a war memorial park under threat of suit from a group like the organizational plaintiff in this case—only to promptly reinstate the cross following massive public

backlash.[26] "For nearly a month, a rotating guard of citizens occupied the park each day, toting American flags and their own handmade crosses. Many argued that the symbol, in the context of a fallen soldier tribute, was secular rather than religious."[27] Similarly, the city of Hiram, Georgia, "fearing a lawsuit," uprooted a white crosses display after receiving just one complaint about it, then put it back up after a massive public outcry.[28] The city of Taos, New Mexico, faces the prospect of litigation over its 57-year-old Bataan Death March memorial, after the Freedom From Religion Foundation began demanding that the city move the cross.[29] And of course, the Ninth and Tenth Circuits have seen extensive memorial-by-memorial litigation as they have embraced reasoning almost as broad as the Fourth Circuit's. Md.Pet.Br.22-25.

Such contemporary clashes can often project religious disputes onto memorials that have long stood as uncontroversial testaments to the sacrifices of our war dead. As much as the Fourth Circuit majority might have preferred that the Prince George County committee and the American Legion had chosen a poppy, they instead chose a Latin Cross as a symbol of the ultimate sacrifice of 49 individuals. By mistakenly perceiving that war memorial as a

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[26] Liz Sawyer, *Under Pressure from Town, Belle Plaine City Council Votes to Restore Cross to Vets Memorial*, Star Tribune, Feb. 7, 2017, http://strib.mn/2uTjFId.

[27] *Id.*

[28] Denise Dillon, *Hiram Honors the Fallen After Restoring Crosses*, Fox 5 Atlanta, May 24, 2016, https://bit.ly/2JW6B9P.

[29] Br. of the Town of Taos 1-2, 4-5, 14-18.

religious display, the decision below needlessly projects contemporary disputes onto a longstanding monument, and in the process engenders religious division and undermines Establishment Clause values in the name of vindicating them. *See Van Orden*, 545 U.S. at 704 (Breyer, J.).

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Just six years ago, the VFW urged this Court to review another decision condemning a cross-shaped memorial. Br. for The American Legion, VFW, et al. as *Amici Curiae* Supporting Petitioner, *Mt. Soledad Mem'l Ass'n v. Trunk*, 567 U.S. 944 (2012). The VFW presciently warned that the decision in that case threatened numerous veterans' memorials, including the Canadian Cross of Sacrifice, the Argonne Cross—and the Bladensburg Peace Cross. *Id.* at 13. Those who would remove century-old monuments to our Nation's fallen targeted the Peace Cross and likely will soon be at the gates of Arlington National Cemetery itself. This court-ordered iconoclasm accomplishes nothing but disrespect of the dead and division of the living. It is not compelled by the Constitution, but rather "create[s] the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid." *Van Orden*, 545 U.S. at 704 (Breyer, J.). This Court should put an end to this systematic effort to "purge from the public sphere all that in any way partakes of the religious." *Id.* at 699.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below.

Respectfully submitted,

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December 21, 2018